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The Takings Jurisprudence of the Warren Court: A Constitutional Siesta

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TULSA LAW JOURNAL

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THE TAKINGS JURISPRUDENCE OF THE WARREN COURT: A CONSTITUTIONAL SIESTA*

Richard A. Epstein†

I. EBB TIDE FOR PROPERTY RIGHTS	644
II. A CRITIQUE OF THE WARREN COURT DECISIONS	650
A. <i>The Prima Facie Case: A Taking of Private Property</i>	651
1. Water	651
2. Overflight Easements	656
3. Lien Rights	658
B. <i>General Regulations</i>	660
1. Prohibition on Use	660
2. Contract Regulation	662
3. Rate of Return Regulation	664
4. Civil Rights Cases	666
III. POLICE POWER JUSTIFICATIONS	669
IV. PUBLIC USE	672
V. COMPENSATION	675
VI. CONCLUSION	675

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I. EBB TIDE FOR PROPERTY RIGHTS

During the 1991 Centennial on the Bill of Rights, Justice Stevens visited the University of Chicago Law School to deliver an address on the historical mission of the Supreme Court as a defender of the Bill of Rights.¹ Much of his talk addressed the exploits of the Warren Court and the major contributions that it made to the law on freedom of speech and religion, on criminal procedure, and on voting rights. As befits a Justice whose own judicial and intellectual work made him sympathetic with the basic orientation of the Warren Court, he spent none of his time talking about the contributions that the Warren Court made in the protection of private property or economic liberties. Nor did he speak of the jurisprudence which explained why these rights might properly be limited under a sound application of the state's admitted police power.

His omissions were not inadvertent. The question of property rights, their status and protection, was not an issue that much troubled or preoccupied the Warren Court. The Court did not hand down a single decision during the years 1954 to 1969 which ranks in the top dozen of important takings cases under the Constitution. The years before and after the Warren Court, however, saw extensive and difficult litigation under the Takings Clause (not to mention the kindred issues that are raised under the Contracts Clause and the Due Process Clauses). Just to name a few of the great cases, *Mugler v. Kansas*,² *Block v. Hirsh*,³ *Pennsylvania Coal Co. v. Mahon*,⁴ *Village of Euclid v. Ambler Realty Co.*,⁵ and *Miller v. Schoene*⁶ all were decided before the constitutional watershed of 1937, and all sharply expanded the scope of state regulation over private property. Similarly, after the end of the Warren Court, the pace again picks up. There are such important cases as *Penn Central Transportation Co. v. City of New York*,⁷ *Agins v. City of Tiburon*,⁸ *Hawaii Housing Authority v.*

1. Justice John P. Stevens, *The Bill of Rights: A Century of Progress, in THE BILL OF RIGHTS IN THE MODERN STATE* 13 (Geoffrey R. Stone et al. eds., 1992). It seems hardly surprising that Justice Stevens issued impassioned dissents in both *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2917 (1992) and *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2322 (1994).

2. 123 U.S. 623 (1887).

3. 256 U.S. 135 (1921).

4. 260 U.S. 393 (1922).

5. 272 U.S. 365 (1926).

6. 276 U.S. 272 (1928).

7. 438 U.S. 104 (1978).

8. 447 U.S. 255 (1980).

Midkiff,⁹ *Nollan v. California Coastal Commission*,¹⁰ *Lucas v. South Carolina Coastal Council*,¹¹ and *Dolan v. City of Tigard*.¹² The closest that one can come to decisive takings cases in the Warren Court are such decisions as *Berman v. Parker*,¹³ *United States v. Central Eureka Mining Co.*,¹⁴ *Goldblatt v. Town of Hempstead*,¹⁵ and *Armstrong v. United States*,¹⁶ which were either mopping-up operations, or modest extensions of the existing law. Occasionally, there are hints of larger problems that have not been fully resolved, but these are mentioned without being fully explored or debated. And some of the most daring innovations in the takings area, such as *Reitman v. Mulkey*¹⁷ and *Jones v. Alfred H. Mayer Co.*¹⁸ are thought of more as civil rights cases than property cases, which accounts for much of their difficulty. But insofar as the focus of analysis is the protection of property rights and economic liberties, there is little energy, excitement or sense of intellectual adventure in the Warren Court. If an analysis of any topic of Warren Court jurisprudence could safely be omitted, I suspect takings and economic liberties more generally would be it.

It is instructive to seek some explanations for this high level of Warren Court quiescence on property rights issues when there was such a high degree of tumult in other areas of its work. The best explanations do not reflect ill upon the Warren Court. It is a commonplace observation, easily forgotten, that courts do not generate the controversies that come before them. While the power of certiorari gives the Supreme Court the power to pick its cases and to hone in on its issues, that power does not allow it to enter into areas where there are no existing controversies between litigants. The Court should make sure that important issues stirring below receive its full attention. But it cannot command legislatures and litigants to redirect their private agendas to suit its own purposes. And for most of the Warren Court, property rights issues of all stripes and decisions were not at the front of the American political consciousness.

9. 467 U.S. 229 (1984).

10. 483 U.S. 825 (1987).

11. 505 U.S. 1003 (1992).

12. 114 S. Ct. 2309 (1994).

13. 348 U.S. 26 (1954).

14. 357 U.S. 155 (1958).

15. 369 U.S. 590 (1962).

16. 364 U.S. 40 (1960).

17. 387 U.S. 369 (1967).

18. 392 U.S. 409 (1968).

There are two explanations for this general trend. The first is historical. The constitutional watershed of the 1937 Term¹⁹ had the effect of blocking property-rights based challenges to the exercise of governmental power on matters of general economic regulation. Questions of economic liberty were also given short shrift, as legislation on these matters was subject to a very low standard of review largely under the Due Process Clause, where even minimum rationality would suffice.²⁰ After 1937, *Lochner v. New York*²¹ came to symbolize a bygone era in which the Supreme Court abused its constitutional power to protect private property and freedom of contract by falsely elevating common law categories to constitutional levels.²²

Yet it is important not to overstate the importance of the 1937 revolution on the status of property rights, whose constitutional protection had been in decline for over half a century. Anyone who takes a cool and dispassionate look at the property rights and economic liberties cases between 1880 and 1936 can only reach one conclusion: there was throughout that period a steady expansion in the scope of government power in all areas of economic life: limitations on the power of taxation were rebuffed;²³ state regulation of health and safety were expanded, even in the teeth of private contract;²⁴ rent control received at least a qualified constitutional blessing;²⁵ zoning powers received very broad construction on their first go-round;²⁶ and the common law accounts of nuisance were solemnly adjudged not to place limits on the state's power to protect one neighbor from the

19. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

20. The standard citations are *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955) and *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

21. 198 U.S. 45 (1905).

22. For a summary of the attack on *Lochner* as falsely constitutionalizing common law norms of property and contract, see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 8.6, at 579 (2d ed. 1988).

Just as the *Swift v. Tyson* doctrine that federal judges should apply the "general common law" in diversity cases could not survive the belief that there just *was* no transcendent body of binding general common law, so too that belief ultimately devastated *Lochner's* due process doctrine that legislatures may not upset the "natural" conditions of contract and property enshrined in common law categories and in their logical entailments.

Id. My own views in RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) are designed to reestablish the broken link between the common law and the constitutional protection of property rights. The book meets with, to say the least, a cool reception from Tribe. See TRIBE, *supra* at 606.

23. See, e.g., *New York Trust v. Eisner*, 256 U.S. 345 (1921).

24. *New York Central R. R. v. White*, 243 U.S. 188 (1917).

25. *Block v. Hirsh*, 256 U.S. 135 (1921).

26. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

harmful activities of another.²⁷ Only in the area of labor contracts did the pre-1937 era show some genuine constitutional backbone. Mandatory collective bargaining arrangements were wisely struck down at both the federal²⁸ and the state²⁹ level. And a minimum wage statute applicable to women only (and thus suspect on two grounds — an infringement of liberty and an explicit sex classification) was similarly derailed.³⁰ But set against the trends in property law, the view that 1937 represents a sharp break with some *laissez faire* past is both an oversimplification of its constitutional sweep and an incorrect denial of the steady enlargement of state power.³¹ *Lochner* was a case, not an era.

Substantial limitations commanded broad assent before the 1937 watershed and continued to command it thereafter. At the onset of the Warren Court the question was not how the Court should reconsider those limitations on property rights that had uniformly expanded over the past sixty or more years. Rather, the issue was how it could disentangle the question of property rights from the other side of the coin and offer heightened levels of constitutional scrutiny in other areas in order to make good on the “two tiers of justice” that were articulated with such clarity and influence in the famous footnote 4 of the *Carolene Products* case.³² The first explanation for the passivity of the Warren Court on matters of property rights is that there was no intellectual debate to fuel judicial controversy over the proper size and scope of property rights.

The second explanation is less theoretical and more practical — it involves not history, but politics. The contemporary legislative agenda did not force the Court to mediate between aggressive state regulators and beleaguered property owners. It is remarkable to recount the large number of property rights cases in the Warren Court that were concerned with dams and water rights, the precise definition of a flowage easement, or the scope of the navigation servitude (largely settled some fifty years before). But these cases doubtless came out of the expansive program for dam construction in an age that was not keen on keeping wilderness pristine. Even five years

27. *Miller v. Schoene*, 276 U.S. 272 (1928).

28. *Adair v. United States*, 208 U.S. 161 (1908).

29. *Coppage v. Kansas*, 236 U.S. 1 (1915).

30. *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923).

31. And on this point at least, Laurence Tribe and I agree. See *Tribe*, *supra* note 22, at § 8.5.

32. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152, n. 4 (1938).

before, the Court had seen a constant stream of disputes over leasehold property that originated in temporary takings during World War II.³³ Occasionally these cases surfaced in the Warren Court, but in obviously diminishing numbers. Otherwise a fair number of cases dealt with such topics as the priority of government liens, the rules governing the extinction of the equitable rights of redemption in foreclosure (itself a holdover from the questions of the 1930s),³⁴ and occasionally novel applications of the zoning law. But in truth the early *Euclid* decision³⁵ was so strongly pro-state that these cases only tested the limits of the basic question, but did nothing to reorder fundamental priorities.

It was only with the rise of far more aggressive legislation in the 1970s and afterwards that novel property claims flooded the courts, for by that time there was some effort to attack the existing synthesis (of which my *Takings*³⁶ book is probably the most prominent, and to many the most misguided). Landmark preservation statutes, wetlands and endangered species, and coastal controls and protection did (and do) represent a new effort of government to go beyond the old powers, efforts that met with powerful resistance. The holdovers from the Warren Court (e.g. Justices Brennan and White) showed themselves to be generally unsympathetic with these property rights claims,³⁷ and it seems to be a fair assumption that they would have proved every bit as hostile to similar claims if these had been pressed during the 1950s and 1960s. But far be it from me to condemn the Warren Court for deeds that took place after it passed into the mists of history.

With this said there is one irony that does deserve a brief mention. The academic scholarship on the Takings Clause has turned out, at least in part, to be more influential than the decisions of the Court itself. Here, in particular, the work of Joseph Sax,³⁸ and Frank Michelman³⁹ were both marked advances over all in the academic

33. See, e.g., *United States v. General Motors*, 323 U.S. 373 (1945).

34. See *City of El Paso v. Simmons*, 379 U.S. 497 (1965).

35. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

36. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

37. See, e.g., Justice Brennan's opinion in *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978) and his dissent in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). See also his opinion in *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990).

38. Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

39. Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation Law,"* 80 HARV. L. REV. 1165 (1967).

literature that preceded them. Both writers conveyed a clear awareness of the immense difficulty associated with any purported comprehensive solution to the takings problem. This seemingly simple problem requires judgments not only about the status of private property, but also the nature of the government institutions that regulate, tax, or take private property. Behavioral assumptions about the goodness and badness of government are not simply curiosities that lead nowhere in the debate over constitutional interpretation. Rather, they are an integral part of any analysis, for in dealing with any form of government activity it becomes critical to know the motivations and objectives of the state agencies that initiate the changes, and, of necessity, of the individuals who compose them.⁴⁰

This academic work highlights how difficult it is (pace the current law) to distinguish in principled fashion between regulatory and physical takings. Even with the latter the takings in question must be paid for by someone, and they impose costs above and beyond the raw value of land. Tracking down the distributional consequences of these takings can be quite complex, and the patterns of abuse that can exist with them may be quite large, especially when the “just compensation” measures applied by the courts are systematically below the level necessary to leave individual landowners indifferent between the continued possession of their lands and the compensation that the state offers as a substitute for it. *Berman v. Parker*⁴¹ was a Warren Court decision that implicated a comprehensive use of the takings power, which anticipated the incidents that took place in *Poletown*⁴² in the 1970s and in Hawaii in the 1980s and 1990s.⁴³ Efforts to deal with the distinction between arbitral and entrepreneurial government activities, or to find the role of demoralization costs and the like, stem from an awareness that it is not possible to cabin in the eminent domain question by artificial limitation and narrow categorization. The effort to figure out who can take and what can be taken becomes by degrees a blueprint for how good constitutional norms can guard against government disasters.

Oddly enough there is scant trace of any of this intellectual ferment in the Warren court decisions. The academic writings did not

40. I push this point hard in Richard A. Epstein, *Property, Speech and the Politics of Distrust*, 59 U. CHI. L. REV. 41, 47-55 (1992).

41. 348 U.S. 26 (1954).

42. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981).

43. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

have time to penetrate into the judicial chambers, so that the two factors identified above — history and politics — continued to hold sway. The absence of any intellectual tension meant that judges had no incentive to probe into these questions. The absence of bold new government programs kept the judicial doctrine barren of the tough substantive disputes that could have energized a lagging area. The harvest here therefore is far more meager than it is in other areas. Nonetheless, a study of the Warren Court's takings decisions helps set the stage for contemporary understandings of the takings issue.

II. A CRITIQUE OF THE WARREN COURT DECISIONS

A regrettable but necessary truth about judicial decisions is that they do not come up in the order in which professors would like to discuss them. Indeed one of the major function of theorists and editors alike is to come up with some structure that permits unruly cases to be tied into neat bundles. For these purposes, this paper will adopt the structure of argument that flows fairly from the language of the Takings Clause itself, and which in any event is adopted in a mostly post-Warren Court treatment of the subject — my *Takings* book. Thereafter the loose ends will be picked up with cases outside the takings area that raise similar issues, albeit it in very different ways, under both the Contracts and the Equal Protection Clauses.

In *Takings*, two ways of stating the takings problem are distinguished. The first and most common approach asks whether government action amounts to a compensable taking, on the implicit assumption that there is no other kind. The great disadvantage of this view is that it collapses conceptually distinct issues, and unfortunately confuses the analysis. The analogy, here, is to private tort law. Tort theory does not approach the compensability of injury as a unitary question. Rather, it divides the analysis into at least four elements: (1) the prima facie case (causation and the basis of liability), (2) affirmative defenses, covering the justifications or excuses based on plaintiff's conduct, (3) the choice of remedy (damages, injunctions, or some mix of the two) and (4) what level of compensation or damages should be provided for the harms so committed. Takings questions are better analyzed by this more nuanced analysis than by merely asking the single question, is the taking compensable?

These tort issues have their concrete parallels in the law of eminent domain. The first task is to set up the prima facie case, and to

ask whether property was taken by the government. The second question is to ask whether the taking was justified in virtue of some wrong that the plaintiff committed, or threatened to commit: in constitutional discourse, these are typically questions about the scope of the state's police power to regulate *without compensation*.⁴⁴ When such justifications fail, the third question is whether the taking was allowed at all. Stated otherwise, the public use requirement in effect limits the power of coercion to certain types of cases and allows the citizen to block the state in at least some cases. A distinctive question, not commonly found in tort analysis, fourth, is the question of whether just compensation has been provided when the taking is done, is for public use, but is not justified under the "police power." These issues are the leitmotifs of any system of takings law, and while the cases themselves do not precisely track the four parts of this analysis, they are best understood if these issues are broken out. Some cases raise two or more of the issues together, and in those cases it is all the more imperative to keep the lines of analysis as clear as possible. Let us consider the four categories together.

A. *The Prima Facie Case: A Taking of Private Property*

1. Water

The question of what counts as a taking of private property initially depends on the question of what counts as property in the first place. In dealing with land, the question is normally one of metes and bounds, and thus not subject to many definitional inquiries. The fixed nature of the resource creates enormous economic efficiencies from separating land into different plots and policing the boundaries between neighbors by the law of trespass and nuisance. But with water law the position has always (from at least Roman times) been otherwise. The movement of the water means that any attempt to reduce it all to possession destroys the value of the resource so that the idiom of water rights has always been one of limited use, correlative rights and duties, sharing, usufruct and servitudes. It is therefore jarring, to say

44. It is important to recall that in some cases the question is whether it is within the scope of the state's police power to regulate when compensation is required, which raises obviously different questions. Yet even these points are sometimes confused. Compare *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507 (1848), which upheld the power to condemn a bridge that the government had conveyed to a private owner upon just compensation, with *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), where the same police power justification arguably was used to allow a state mortgage moratorium *without* compensation. For a comparison of the two decisions, see Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 735-738, 740-743 (1984). For further discussion, see *infra* text accompanying note 75.

the least, that the traditional Supreme Court view of property rights in water says that the Federal Government, in virtue of its power to regulate under the Commerce Clause, has a "superior navigation easement that sweeps all aside."⁴⁵

That development, however, long predated the Warren Court, having its origin in *United States v. Chandler-Dunbar Power Co.*, which attributed to the navigation easement a dominance that it hardly deserves. In *United States v. Twin City Power Co.*,⁴⁶ the Warren Court pointedly refused to re-examine these issues. Justice Douglas showed that the dominant approach to the dominant servitude had not lost its teeth. The Twin City Power Company had acquired "fast" or "riparian" lands on both banks of the "Savannah River" for inclusion in its own Clark Hill project which had its own hydroelectric component.⁴⁷ The issue was stated to be one of valuation, but that was in reality a fig leaf for the antecedent question of the nature of the underlying property rights. Twin City Power Company had acquired these fast lands because they offered an ideal site for the construction of a dam to meet the growing power demands of the river area, and the market price for the lands in question reflected the value of such a use. But the utilization of the *flow* within the river was precarious given the dominant nature of the navigation servitude. Justice Douglas took evident delight in pulling the rug out from under the company's plans by holding that the government did not have to compensate the company for the value of the site as a power station, no matter what its own planned use of the land. Under the circumstances of the case, Twin Cities could claim Congressional double-cross, for in the period from 1901 to 1919, Congress six times had authorized it to build the dam in question.⁴⁸ There is a certain charm in allowing the government to acquire this land for the value of its standing timber only to use it to construct its own dam project. A similar double-cross had been thwarted in *Monongahela Navigation v. United States*,⁴⁹ where the private right to charge tolls was treated as a compensable element of damages. But the navigation servitude in *Chandler-Dunbar* swept this precedent aside.

45. *United States v. Chandler-Dunbar Power Co.* 229 U.S. 53 (1912). For what it is worth this decision took place during the *Lochner* period.

46. 350 U.S. 222 (1956).

47. *Id.* at 223.

48. *Id.* at 231. (Burton, J., dissenting).

49. 148 U.S. 312 (1893).

Justice Burton, for the four dissenters, insisted that the appropriate measure of compensation was fair market value of the property in question, measured by what a third party would pay for the assembled site. But the mistake that Burton makes is that this buyer would be quite happy to pay something for the expectation that the government would not pull the rug on the deal. If, however, the navigation easement is paramount, then the buyer would be subject to the same level of political risk as the seller, and therefore would only pay that reduced sum of money that reflected the risk of the loss, without compensation, of the navigation easement. The government need not pay for that expectation when it lies in its own power to dash it. So if the regrettable law on navigation servitudes is correct, then *Twin City* is correct also. And it is one in a line of cases — the Taylor Act grazing rights are the post-Warren Court example⁵⁰ — in which the government's use of its at-will powers has reduced its compensation bill, but left the aspirations of private parties in tatters. The proper cure, though, is not to dispute Douglas' treatment of at-will rights, but to dispute any view that the commerce power has authorized the creation of the paramount navigation servitude in the federal government.

The ability of the government to squeeze the last drop of advantage out of its practical rights was also the theme in *General Box v. United States*,⁵¹ another water rights case involving timber on "batture," a Louisiana institution which gives the state the right to cut down timber that grows on private lands located between the high and low water marks. Since early times, state law has given the state the power to remove this timber, without paying compensation to riparian owners, in order to maintain navigation along the river. As part of the federal program for flood control along the Mississippi River, the state agreed to assign, without cost, its right in batture to the Federal Government for its part in the project. The United States went in under this servitude, without notice, destroyed the timber, and then was successful in defeating a claim for compensation for the value lost. As assignee of the rights of the state, it had to pay no more compensation than the state did. The question of whether these batture rights were assignable was not discussed in the opinion, and Justice Reed reached the unhappy conclusion that the state's own easement was one that allowed for the bulldozing of the timber without giving the owner the opportunity to harvest it for commercial use.

50. *United States v. Fuller*, 409 U.S. 488 (1973).

51. 351 U.S. 159 (1956).

Once again one is struck by the massive inefficiency in the nature of this operation. If the similar easement of batture had been given to a private party, notice and opportunity to harvest would have reduced the costs of the total operation, since the gains that the government gets from not giving notice (especially when there is no emergency) are small relative to the value of the timber needlessly lost. One could also argue that servitudes of this sort should not be freely assignable — as most riparian rights are not assignable, because of the danger that the assignee will impose far heavier burdens on the servient tenant than would the original owner. But all these points were brushed aside, and the long tradition of construction of easements and contracts in aid of government power carried the day. *General Box* did not establish a power of Congressional dominance. But it certainly helped to preserve it.

The third of the Warren Court water cases is in a sense the most difficult to understand. In *United States v. Virginia Electric*⁵² the government acquired an interest in some riparian lands by condemnation. Those lands were subject to a flowage easement that the owner had conveyed to the respondent prior to the initiation of the condemnation, and the landowner quite happily agreed to convey to the government a second flowage easement over that same land for \$1.00, but “subject to ‘such water, flowage, riparian and other rights, if any,’ as the respondent owned in the tract.”⁵³ It followed therefore that the government did not have to compensate the riparian owner for the value of the land while flooded, since the owner had ceded that right to a third party. The question is whether it had to compensate the respondent for its loss of the assigned flowage easement (that is, the flow of navigable waters) when the government could keep those waters to itself by exercising the navigation servitude, thus reducing to zero the value of the discrete flowage easement to its purchaser.

If one looks at the two private interests separately, there is a certain logic to the government’s case, but this truly looks like a situation in which the sum of the parts should be as great as the whole. If compensation is denied the respondent, then the party that profits from the initial purchase of the flowage easement is not the respondent as purchaser, but the government. The original landowner gets full compensation in two parts, but compensation for one part is paid by a

52. 365 U.S. 624 (1961).

53. *Id.* at 625.

private party; yet the benefit of that compensation goes into the government pocket. This approach hardly encourages security of exchange, for useful transactions between private parties will not take place if the sum of the values created is necessarily less than the values that existed before the transaction. It will hardly do to promote a sale of an easement if the total value of compensable interests before sale is \$1,000, but after the sale of part the total value of the compensable interests is reduced to \$500. Why enter into any deal that grants a windfall to a stranger? Yet that is one unfortunate development that can occur whenever the government acts like a sleeping giant, armed with the navigation servitude club.

The Supreme Court held that the flowage easement was entitled to some value, but on a very odd theory. It was not that the water itself could be used for power purposes on the riparian lands. Rather the sole source of the value lay in the threat that it gave the holder of the interest over the owner of the land, in its "right to destroy" any uses that might take on this land, a right so powerful that any buyer of the land would be well-advised to make sure that the easement was purchased as well.⁵⁴ The Court thus held that it was a mistake to treat the flowage easement as though it were the "equivalent of the value of the servient lands for agricultural, forestry, or grazing use."⁵⁵ The right measure of value under the circumstances was the ability of the holder of the interest to *block* these uses by others. All this is odd if not perverse: the purpose of eminent domain is to overcome holdout problems, a point recognized in the negative in *Twin City Power*, where the claim for value expressly excluded any holdout value. And it makes it utterly unintelligible as to why the holder of the servient land would create the easement in the first place, for the development rights in the land are worth far less split than they are together.

Professor Michelman finds in this case the idea that condemnation is sensible for the outright destruction of a thing, but not for a partial regulation of the thing which leaves the owner with some residual element of value.⁵⁶ The problem here is that of the numerator and denominator: does it make a difference if the state takes all of a small thing, or part of a large thing? It is one that has embarrassed the Court in the years since *Virginia Electric*.⁵⁷ It might be nice to

54. *Id.* at 630.

55. *Id.* at 633.

56. Michelman, *supra* note 39, at 1232-33.

57. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

afford compensation (albeit by the wrong valuation method) because the interest is separate and apart from all others and thus fully wiped out, but it is in my view social folly to have to decide constantly whether a parcel of land which is developed by subdivision over time may be regulated within an inch of its life without compensation.

The overarching theme should be that no division or combination of interests in land should add or detract from the government's obligation to compensate. Private parties should not have an incentive to reconfigure their land to maximize the compensation payable. "Compensation neutrality" should become a mantra of this branch of the law much as "tax neutrality" is a mantra of a sound system of taxation. Justice Stewart, writing in *Virginia Electric*, hinted at just this approach when he noted that "[t]he guiding principle of just compensation is reimbursement to the owner for the property interest taken. 'He is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more.'"⁵⁸ Just the juxtaposition of these two sentences shows how little Justice Stewart approached the critical questions. Compensation for the property taken does not include consequential damages; yet these must be included if the property owner is "to be put in as good a position pecuniarily as if his property had not been taken." And any effort to carry this approach over to regulatory takings would lead to a revolution in outcomes, for no longer could the question be whether any viable economic use was retained, but whether that use was equal in value to the property prior to regulation — a rule that makes most zoning restrictions compensable events. But Justice Stewart had no inclination to go beyond the particulars to the larger theory. He thus missed another opportunity to write a far more searching examination of the takings law, and the decision itself is but a small ripple in the general torrent of cases that allow the navigation easement to remain far more dominant than it deserves to be.

2. Overflight Easements

The difficulties that water rights present in the overall scheme of property rights are paralleled in part by overflight rights. Long before the Warren Court, courts and legislatures were forced generally to make peace with the airplane's massive challenge to the *ad coelum* rule, under which, in an incautious moment, the common law gave the

58. *Virginia Electric*, 365 U.S. at 633 (quoting *Olson v. United States*, 292 U.S. 246 (1934)).

surface owner the rights over lands to the heavens, secure in the fact that these rights were of value to no one else. The airplane changed that, and these rights were reduced in size and stature (over eminent domain challenges) to protection of the area of effective occupation, so that a classical holdout problem did not bring air transportation to a halt. The air traffic was regarded as an upper neighbor to the landowner. The question of trespass in the lower airspace remained, and, in the pre-Warren Court decision in *United States v. Causby*,⁵⁹ it was held that airplanes that engage in low overflight have taken a compensable easement in the property for which compensation is required — hardly a threat to the welfare state.

In *Causby*, the only party that flew over the lands was the United States, so it was easy to figure out where to point the finger on the question of compensation: by the rules of vicarious liability, the honor fell to the government. With *Griggs v. Allegheny County*,⁶⁰ the overflights were by commercial carriers, so that the simple agency model created an incredible problem of apportionment of the harm, with the further embarrassment that the taking of the overflight easement was by a private party. Not to worry. The Court held that the local government that agreed to operate the airport had to pay for the easement it had, de facto, condemned. In essence, the local government was treated as though it stood in the shoes of the United States. Justice Black dissented, saying that the plaintiffs had targeted the wrong defendant, a constant problem in eminent domain cases, for he believed that the federal government that underwrote the program, not the state airport authority, had condemned the easement.⁶¹ The point here is one of little long-term institutional significance, for once the issue is flagged by the courts, any dollars and cents financial issues could be decided by contract between the federal government that supplies funds to local airports and the airports that receive those funds.

Griggs therefore does little harm, and for that matter, little good. Its moral is that where there is no navigation servitude (in the skies) the compensation model is alive and well. The difficulties surely come with the valuation of the interest in quiet enjoyment that is compromised by the development. The sad point here is that when the nuisance is caused not by an overflight, but by a flight over adjacent

59. 328 U.S. 256 (1946).

60. 369 U.S. 84 (1962).

61. *Id.* at 90-91 (Black, J., dissenting).

properties, that interest becomes noncompensable, at least by one important Circuit Court opinion.⁶² The whole problem would have been decided far more sensibly if it were understood that nuisance-like activities by the government are compensable wrongs, just as nuisance-like activities by private parties can be suppressed without compensation. Thus, the Warren Court had the chance to bring some parity to public takings law and private nuisance law, but, once again, it missed the opportunity.

3. Lien Rights

In one sense, the most important case decided during the Warren Court years was an obscure dispute over lien rights to unfinished boats. In *Armstrong v. United States*,⁶³ a shipbuilder in default was forced by the United States to transfer all its interest in the boat and the materials on hand to the United States, free and clear of all mechanic's liens on the boat — including that held by Armstrong. No one doubted that the government could call for the unencumbered boat, but it is quite a different question as to whether that option, when exercised, could nullify all state law mechanic's liens. In one sense they could, because the government could take free and clear title to the boats, so the lienors specific security is lost. But in the relevant sense they could not. The Court held that the Federal Government could take free and clear title only by paying off the liens. Since that option is always open to private parties as well (for the nature of a lien right is for security only), the government in essence was told that it had to respect the existing liens, for which it promptly paid. This result was, in the long-run, a victory for the government, for if the rule had remained otherwise, no one would dare do work without prompt payment on a government vessel. The risk of high-handed government action would lead to more inefficient construction practices that could only increase the government's costs of military procurement. In a sense therefore, *Armstrong* is the flip side of *General Box*.⁶⁴ The government as assignee takes subject to liens that bind the assignor.

One may doubt that there is one law professor in a hundred who knows *Armstrong* for its facts. Rather, the case has entered the legal canon solely for one concluding observation, which has become the

62. *Batten v. United States*, 306 F.2d 580 (10th Cir. 1962).

63. 364 U.S. 40 (1960).

64. 351 U.S. 159 (1956).

bible for all those who wish to limit the scope of government regulation generally (myself included). Its sacred text reads, "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."⁶⁵

The sentence is a bolt from the blue which follows an observation that the ability to keep the boat lien-free under its contract with the shipbuilder offers no reason for not compensating the lien holders. Yet in principle the sentence could apply to any form of regulation that imposes heavy burdens on a single individual for the benefit of society at large. Seen in this light, the Eminent Domain Clause is designed to deal with matters of public funding and to counteract the dangers of majority rule. This notion was belittled in the post-Warren Court decision of *Penn Central Transportation Co. v. City of New York*,⁶⁶ which held that fairness and justice did not apply to mere regulation that prevented the development of valuable land. Intuitive ideas of fairness and justice, though, cannot be so easily expunged from takings jurisprudence. They were appealed to, for example, in a dissent by Justice Scalia, who insisted that if San Jose wants to have rent control for the benefit of poor people, it could tax generally and provide specific subsidies.⁶⁷ San Jose had no warrant in forcing the costs on the hapless landlords whose units were occupied by indigent tenants.

The efficiency implications of Justice Black's justice claim are also evident. If the state has to pay, it will compare the private costs of development with the state gains, for it has to persuade reluctant taxpayers to foot the bill. But allow these burdens to be imposed on a small minority within the jurisdiction, and we have the constitutionalization of Leo Durocher's famous maxim, "let's you and him fight." But of the possible extension of this insight to zoning or rent control

65. *Armstrong*, 364 U.S. at 49.

66. 438 U.S. 104 (1978). The profanation of the sacred text reads as follows:

While this Court has recognized that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49 (1960), this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.

Id. at 123-24. The citation is to Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962) a Warren Court decision, discussed *infra* text accompanying notes 94-100.

67. *Pennell v. City of San Jose*, 485 U.S. 1, 23 (1988) (Scalia, J., dissenting).

— both held clearly constitutional then and now — there was not so much as a glimmer or hint. Another constitutional opportunity missed, by a judge who actually cared about the larger issues lurking in the case.⁶⁸

B. General Regulations

1. Prohibition on Use

What is most striking about the Warren Court is that it faced very few cases in which general regulations, short of dispossession, limited the use and development of property. The first case of this sort was *United States v. Central Eureka Mining Co.*,⁶⁹ where the government imposed restrictions that prevented mine owners, as owners of nonessential wartime operations, from operating their mines. In these cases the government took nothing, in the sense that it did not seize the mines but only stopped their full economic use, in order to serve the public good in wartime. In order to minimize the scope of the government intrusion, the Court gave this hypothetical: if the order had restricted the use of all equipment needed to operate the mine, there would be no taking; why then complain about the exercise of a larger right that imposes no greater burden?⁷⁰ The fallacy in this argument is that it assumes that any ban on equipment use is not a taking of the equipment, with a consequential loss measured by the lost profits from the mine. But that restriction on equipment use appears to constitute a taking as well, for which consequential damages are appropriate. A private party could be held for lost profits whether he barred the mine doors or stole the tools. Why should the government be in a different position? The verbal parry to one side, the hard question is whether this regulation is a taking, and if so whether that taking is one justified by the exigencies and necessities of war.

At one level this was a straight regulatory takings case, and the decisive precedent is *Mugler v. Kansas*,⁷¹ where the prohibition on liquor manufacture was thought to be less offensive insofar as the government did not take possession of a factory that became a worthless hulk (and potential liability?) for its owner. It came as no surprise

68. See *City of El Paso v. Simmons*, 379 U.S. 497, 518 (1965) (Black, J., dissenting), discussed *infra* at pages 662-64.

69. 357 U.S. 155 (1958).

70. *Id.* at 166 ("Obviously, if the use of equipment were prohibited, the mines would close and it did not make that order a 'taking' merely because the order was, in form, a direction to close down the mines.").

71. 123 U.S. 623 (1887).

that this decision was dutifully cited as a precedent for the outcome in *Central Eureka*, as was *Pennsylvania Coal Co. v. Mahon*⁷² whose “too far” test was cited as working on behalf of the government.

Yet the case involves more than a simple taking, for the decision was heavily influenced by an attitude of judicial deference to legislative action in time of war. The decision in *Central Eureka* is a textbook example of how dangerous it is to collapse the questions of takings and justifications into a single undifferentiated mass. If the restriction on use and operations had been treated as a taking, then the government would *clearly* have to pay to effectuate it. The occupation of land for war purposes, even on a temporary basis, resulted in endless lawsuits to calculate the value of taken leasehold interests, a line of cases that had run its course prior to the Warren Court. Those were all actions that triggered obligations for just compensation, and the result here should be the same. But here, the Court adopted quite a different standard because a “mere” regulation was involved. “War, particularly in modern times, demands the strict regulation of nearly all resources. It makes demands which otherwise would be insufferable. But wartime economic restrictions, temporary in character, are insignificant when compared to the widespread uncompensated loss of life and freedom of action which war traditionally demands.”⁷³

There is no awareness that this quotation flies in the teeth of the sentiment expressed some three years later in *Armstrong*, and indeed Justice Black was on the wrong side in *Central Eureka*. Here, for example, the mineowner would surely have no complaint if the government bid up the cost of its mining inputs, even if it were forced to suspend operations to go out of business altogether. So the question here is not whether there is any special solicitude for established enterprises in time of war, for there is none against competition. But the question does arise, more generally, how should the nation respond to the vicissitudes of war. War places a premium on the efficient use of resources, and it is far from clear that this is done through a command and control economy. Surely, if the only question is obtaining sufficient revenues for funding the war effort, those can be obtained by the appropriately high level of taxation. Yet no matter what the tax level, the major fear still remains: the government will not use its tax dollars wisely if it does not have to pay for the substantial dislocation that it forces on this hapless coal miner. But far from facing this problem

72. 260 U.S. 393 (1922).

73. *Central Eureka*, 357 U.S. at 168.

head on, the Court turned somersaults to avoid the compensation issue.

Oddly enough it is not clear that this case would be decided the same way today, for even this regulation might flunk the "too far" test because the restrictions allowed no viable use of the property, at least for the duration of the war. But again one can never be sure about the legal outcome under current law: with a temporary restriction, as this one surely was, some residual economic value was left for future periods, so it is difficult to know what the reference point should be for deciding whether the rights were fully stripped or not. Temporary occupations of property are surely takings; so why not temporary restrictions on use? In my view, these cases are all part of a seamless web, in which small differences in the magnitude of burdens reflect themselves in small differences in valuation. But the Supreme Court sees, or constructs, a chasm where none exists. *Central Eureka* is thus another wrong decision, and another lost opportunity.

2. Contract Regulation

The interaction between government regulations and economic liberties is often contested not under the Takings Clause but under the Contracts Clause, and in the Warren Court there was one notable opinion that upheld the right of the state to modify the protection it afforded purchasers of property at foreclosure sales. In *City of El Paso v. Simmons*,⁷⁴ Texas had long allowed the owners of foreclosed property the indefinite right to redeem so long as their redemption rights were not cut off by a sale to a bona fide third party. The effect of this unwise provision was that it made it impossible for title to be quieted so long as property remained in the hands of the state. In this case, land was sold in 1910 under a contract that called for a down payment of 2 and 1/2 percent, with interest due annually on the full amount. The principal on the loan was never paid down. Some thirty-one years after the initial transaction, in 1941, Texas changed the rules of the game so that the right of the defaulting buyer to redeem the property was cut off in five years, whether or not the property was sold. Six years after the passage of this statute, the buyer went into default, and one day after the five year limitation period had expired, the purchaser sought to redeem his land. That redemption was permissible under the terms of the original contract, but was precluded by

74. 379 U.S. 497 (1965).

the 1941 statutory modification. The Supreme Court,⁷⁵ over the lone dissent of Justice Black,⁷⁶ upheld the statute on the ground that the state had great latitude in the manipulation of contractual obligations, at least since its critical decision in *Home Building & Loan Ass'n v. Blaisdell*.⁷⁷

All things considered, even a die-hard defender of contract rights has to put in a kind word for the 1941 statutory reforms, which go a long way toward clearing title to lands in the Texas system. Yet this is not to say that the result reached by the Court was correct, for the proper solution is to provide just compensation for the elimination of the original contract rights, a provision to which even *Blaisdell* paid lip service. But what kind of compensation should be paid? In *Blaisdell* the state's argument was that the tenants in possession continued to have to make mortgage payments to the lender for remaining on the property — albeit payments that did not leave the lender indifferent to the loss of his foreclosure rights.

In this case, that compensation theme could have been pursued if the state made a small forgiveness in the total outstanding amount of the loan. But how much? The answer has to be very little indeed. The 1941 statute applied only prospectively, and it allowed any defaulting buyer five years to set matters right from the date of any future breach, a pretty generous forgiveness period. The mortgages carried very low interest rates and the property had appreciated in value, so that the risk of default was quite low. Hence it is quite possible that a one percent downward adjustment in the principal balance would have improved the situation all around, without the need to enter into time consuming negotiation with each purchaser of state lands. The strength of Justice Black's position thus rests on a point that he did not quite make: the ease with which this adjustment can be made, and the importance of making that adjustment for the fidelity of our constitutional tradition. The Court's eagerness to improve the machinery of conveyance, "to restore confidence in the stability and integrity of land titles,"⁷⁸ and to avoid the "perpetual reinstatement"⁷⁹ of defaulting, led it to read *Blaisdell* as a decision that said

75. *Id.* at 517. Compare *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507 (1848) (upholding the power to condemn a bridge that the government had conveyed to a private owner upon just compensation) with *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

76. *Simmons*, 379 U.S. at 517 (Black, J., dissenting).

77. 290 U.S. 398 (1934).

78. *Simmons*, 379 U.S. at 511.

79. *Id.* at 513.

that contract rights may be ignored when there is a compelling state interest to do so, a position that is productive of all sorts of mischief when applied generally. That conclusion may well on rare occasions be correct when the public gains from the sacrifice of contract (or property) rights is huge and the possibility of making compensation to the individual losers of the transaction is small. But here an easy mechanism exists, and perhaps it would have been wise to have held Texas's feet to the fire to make sure that they observed the constitutional niceties, not because the 1941 statute was foolish and unwise, but because all its laudable objectives could, and should, have been achieved through payment of just compensation, in the form of a downward debt adjustment.

Once the hard cases go the wrong way, then it is quite easy to allow the state to repudiate obligations — in the public interest, of course — when one percent adjustments in mortgage balances are not quite sufficient to carry the day, as happened with the regrettable Supreme Court decisions that allowed the federal government to renege retroactively and with impunity on its promises to firms that joined in its Pension Guaranty Corporation.⁸⁰

3. Rate of Return Regulation

The question of regulation has also arisen in connection with cases dealing with rate of return regulation. The rate of return formulas were first introduced into the law in order to avoid two horns of a dilemma in dealing with those industries that could be fairly described as natural monopolies, that is, those industries characterized by diminishing marginal costs of production over broad portions of their supply curve. The diminishing marginal returns implies that it is more costly for two firms to produce the relevant outcome than one, and hence a cost to competition. The price of judicial and legislative indifference to this prospect is monopoly profits to the producer. The price of excessive legislative regulation, however, is the risk of confiscation of the facilities of the producer, who can be allowed a return sufficient to cover the variable costs of his investment, but not to recover the capital invested within the firm.⁸¹ The "just compensation" solution is one that allows the state to regulate but insists that it allows

80. *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986).

81. For a discussion of these and kindred difficulties, see *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989).

the regulated firm to recover a risk-adjusted rate of return on its invested capital. The key question is how.

Before the Warren Court, Justice Douglas, in one of his most influential decisions, *Federal Power Commission v. Hope Natural Gas*,⁸² held that it was sufficient for the government to give each firm that suitable return on its initial investment without having to determine whether the capital invested was still used in the rate base. The question in the *Permian Basin* cases⁸³ was whether the investments of separate and distinct companies in a common pool of oil and gas had to have their rates of return under *Hope Natural Gas* calculated on an individual basis, or whether each firm could be required to accept a return based on their pooled investment. "The most fundamental of these [constitutional questions] is whether the Commission may, consistently with the Constitution and the Natural Gas Act, regulate producers' interstate sales by the prescription of maximum area rates, rather than by proceedings conducted on an individual producer basis."⁸⁴ The pooling procedure created substantial administrative simplification, and it did not increase the total costs to consumers above and beyond what they would have to pay under *Hope Natural Gas*. But it had the further effect of enriching some members of the pool at the expense of the others. Justice Harlan wrote for eight members of the Court in sustaining the restriction, quoting *Hope* and noting that it applied here. The decision simply followed the general rule that enormous discretion is allowed the government in administrative proceedings, especially on matters of rate regulation which had been "customary since time immemorial"⁸⁵ in common law jurisdictions. Once again we have the Supreme Court on cruise control, without the slightest effort to examine whether the justifications for price regulations in other settings might be exceeded in this particular context, given the equally ancient requirement of a reasonable rate of return on investment. The vast bulk of the opinion was then dutifully devoted to complex administrative law and rate regulation matters.

In something of an irony, Justice Douglas thought that his *Hope Natural Gas* rule still had some teeth, and dissented on the ground that his decision a quarter of a century before required the level of

82. 320 U.S. 591 (1944). That decision rejected the earlier view that the rate of return was calculated only on those assets used and usable in the business. See also *Smyth v. Ames*, 169 U.S. 466 (1898).

83. 390 U.S. 747 (1968).

84. *Id.* at 768.

85. *Id.*, citing, as one might expect, *Munn v. Illinois*, 94 U.S. 113, 133 (1876).

individualized determinations that afforded each party its own just rate of return.⁸⁶ But owing to the Court's general lack of interest in the constitutional issues, his complaint went largely ignored: but once again the question is why when the issues are so profound and difficult. Could the state condemn a city block of houses and pay each owner the average value of all houses on the block? Or would some individuation be required? The answer is not easy to reach and depends at the least on the interaction of the costs of an individual evaluation relative to the anticipated deviation from the true value that is produced by adopting any short cut. But that relationship was just not probed in a setting that thought that judicial deference to administrative decisions was the proper response in all complex regulatory settings. Yet the problem is more insistent, and it comes back to haunt us all under the Cable Act of 1992, another price regulation scheme where the costs of individuation are too high, and the dangers of mis-evaluation too great. But massive impracticality offers no constitutional defense under the Takings Clause, although it should.

4. Civil Rights Cases

The stakes in the next regulatory takings case of this period are somewhat higher. Most people remember the constitutional battles over civil rights statutes and think of the question of jurisdiction. Is this statute constitutional because it falls under the commerce clause or because it falls under the equal protection clause? Yet there was *also* a takings issue raised in *Heart of Atlanta Motel v. United States*,⁸⁷ which was dispatched with commendable swiftness by the Court. Once it was decided that the activities in question affected commerce, then the only issue was this: "If it [the statute] had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate. If they are, appellant has no 'right' to select its guests as it sees fit, free from government regulation."⁸⁸ Lots of states passed these laws, lots of people thought that they were correct; and the fact that there is an obvious tension between the basic right to exclude and the requirements of the civil rights laws was dismissed by putting the word "right" in quotation marks, as if the scare quotes performed the analysis.

86. *Permian Basin*, 390 U.S. at 829 (Douglas, J., dissenting).

87. 379 U.S. 241 (1964).

88. *Id.* at 258.

In truth the challenge is far more serious. At one level the argument is that so long as the government does not occupy the land itself, then it is all right to breach the wall of exclusivity. But this means that property ceases to be a way to organize relations between individuals and instead only works as a bulwark against direct government intrusion. The thought that the government has a strong stake in the outcome, given the private constituencies that line up behind or against legislation, was not really addressed in this case. Instead the Court noted that there really was no loss in this case:

It is doubtful if in the long run appellant will suffer economic loss as a result of the Act. Experience is to the contrary where discrimination is completely obliterated as to all accommodations. But whether this be true or not is of no consequence since this Court has specifically held that the fact that a 'member of the class which is regulated may suffer economic losses not shared by others . . . has never been a barrier' to such legislation.⁸⁹

The impulse is manifestly inconsistent with *Armstrong*, which had been decided only four years before. The question of compensation is a real one, of course, and the possibility that a universal imposition of the prohibition would regulate all such institutions cannot be dismissed out of hand. By the same token, one would hope for more argument about the question. Thus one possible approach asks whether the antidiscrimination norm should apply to firms in competitive industries, where new entry is feasible, or whether it should be confined to monopolistic situations, including protected trade unions, and common carriers and inns that enjoyed a position of that sort in earlier times. Here it could well be that these conditions were no longer satisfied, and the statute could still have been justified as a means to counter the private violence that would have stopped most restaurants from integrating when they wanted to. But no contingent empirical claims were raised in this case. Generalized truths (whose truth is far from self-evident) coupled with statements about irrelevance ruled the day.

For this Court the social issue dominated the narrow legal one. In the light of hindsight one would hope that some people at least would think that a far tighter justification for this restriction on property use is called for. But if so, then we once more have a case of a missed opportunity to strike down a statute that has been extended well beyond its permissible limits under both the commerce and the

89. *Id.* at 260.

takings part of the analysis.⁹⁰ But for takings law there was no innovation here. And for the Court to innovate on takings in the context of civil rights would have been too suicidal for its political survival. The powerful New Deal conception that property does not include the right to pick one's trading partners was a status quo position that this Court was eager to embrace.

In one sense the challenges to the Civil Rights Act of 1964 broke no constitutional ground, for "all" the Warren Court did was to ratify legislative judgments about the constitutionality of the statute. Its level of judicial innovation, however, became far more pronounced in *Reitman v. Mulkey*⁹¹ where in an ironic sense the tables were turned. In that case, California had passed a statute, the Unruh Act, which prohibited discrimination in private real estate markets, both sale and rental. The statute itself was overturned by a referendum which in effect provided that all private owners had the right to sell or lease their property to whomever they pleased — a restoration of the prior common law position that treats the right to dispose of property to whomever one sees fit as an ordinary property right. The referendum, which was carefully drafted, did not apply to hotels and other forms of public accommodations to which a traditional common carrier duty of universal service attached. And it was not selective in its application: whites and blacks alike each had the same right or power. There is little question that even the Warren Court would have done nothing if the original common law rule had neither been disturbed by legislation nor reinstated by referendum. But once the status quo ante was brought about by referendum, then the judicial wheels started to turn. The passage of the statute was clearly motivated to preserve the rights of private individuals to discriminate. From there it was thought to be a short leap to saying that the discrimination was "authorized" by the state, which had returned the power of selection to the individual. From there it was a short move to say that a race-blind statute was itself in direct violation of the Equal Protection Clause, whereupon it was struck down.

What is quite remarkable about the case, is that the common law definition of property rights did not suffice to defend a statute against constitutional attack. Thus, once the obvious is established — that real estate rental and sales markets are highly competitive — then the

90. For this constitutional challenge, see RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* ch. 7 (1992).

91. 387 U.S. 369 (1967).

bottom drops out in any case that allows a restriction on the right to choose trading partners. If so, then the proper constitutional fire should be directed not at the referendum that repealed the Unruh Act, but at the Act itself. Yet so strong was the Warren Court's commitment on discrimination that it was prepared to strike down the reinstatement of the common law position even though it would not dare in and of itself to hold that some antidiscrimination law in housing was constitutionally required. Any conflict between property rights and the modern civil rights movement could come out only in one way.⁹²

III. POLICE POWER JUSTIFICATIONS

The second of the great eminent domain questions concerns the scope and limits of the police power justification. On this issue the major bone of contention — before, during, and after the Warren Court — has concerned the extent to which the law of nuisance shapes the contours of public law. I have long argued that it does and should, and that the government as agent of successful citizens cannot go beyond their powers, save to condemn upon just compensation.⁹³ If the boundary lines between neighbors make sense under the law of nuisance, then the government cannot simply inject itself on one side of a private dispute and change the rules of the game. So, in the end, the position here is relatively simple. Where the private party commits the nuisance, then a government injunction, tailored to the situation, can be imposed without paying compensation. Where it has committed no nuisance, there is no wrong to enjoin, and the government must purchase any easement that it desires. There is no right for an individual to pollute; but no right for the government to stop by fiat activities that are short of pollution. In some cases the government stops one nuisance, or tolerates another, but provides compensation under the parallel restrictions imposed on others. These situations raise the question of implicit-in-kind compensation that was not much in evidence during the Warren Court. Here, two police power cases, which are striking not for their differences in outcomes, but for their differences in language and approach, will be discussed.

92. I use the phrase "modern civil rights." That commitment was also found in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), which read the 1866 Civil Rights Act to bar private discrimination in housing.

93. EPSTEIN, *supra* note 22, chs. 8-9.

In *Goldblatt v. Town of Hempstead*,⁹⁴ the question before the Court was whether Hempstead was within its rights to stop the appellant from removing all sand and gravel from its mines, an activity that it had undertaken continuously for nearly thirty years. In the first year of the digging, a large crater was made, which was filled with water and thus transformed into a twenty acre lake with an average depth of twenty-five feet. The question was whether this restriction on the right to remove sand and gravel was so onerous and unreasonable as to constitute a compensable taking.

The first question, of course, is whether any restriction on the right to mine on one's own land constitutes a *prima facie* taking by the government. On that issue, the *ad inferos* companion to the *ad coelum* rule indicates that mining sand and gravel is an ordinary incident to property, and one that can be severed and sold as a separate interest. The entire question then is whether the restriction on digging below the water level is necessary to protect from collapse of the homes and structures located in the vicinity. For these purposes the assumption will be that the common law recognizes a right of lateral support, so that if that showing could be made, then the restriction is permissible, unless some lesser restriction yields the same benefit. (The discussion will ignore the question of margins: what happens if a fifty percent relaxation in the restriction increases the chance of subsistence by one percent?)

The Court duly noted that this prohibition wiped out all the economic value from the land but did not think that this itself was sufficient to condemn the ordinance, for *Mugler* and *Central Eureka* were available as precedents and were duly pressed into service for the propositions for which they so obviously stand.⁹⁵ And once again we were assured: "There is no set formula to determine where regulation ends and taking begins."⁹⁶ But this basic orientation was strengthened by the "usual presumption of constitutionality" which upheld the restriction as a valid police regulation.⁹⁷

What is most fascinating about the case was the way in which the Court peered into this question. The opinion starts with some promise, when it says that a safety regulation should be evaluated in light of its impact on safety. "To evaluate its reasonableness we therefore

94. 369 U.S. 590 (1962).

95. *Id.* at 593-94.

96. *Id.* at 594. It was the words "set formula" that were incorporated into *Penn Cent. Transp. Co. v. City of New York*, 428 U.S. 104 (1978).

97. *Goldblatt*, 369 U.S. at 594-96.

need to know such things as the nature of the menace against which it will protect, the availability and effectiveness of other less drastic protective steps, and the loss which the appellants will suffer from the imposition of the ordinance.”⁹⁸ The Court then notes that there was a “dearth of relevant evidence” on these points, which might lead the uninitiated to think that the state has not carried its burden to show that the regulation is related to safety. But the lack of relevant evidence was turned into a decisive advantage for the state: “Although one could imagine that preventing the further deepening of a pond already 25 feet deep would have a *de minimis* effect on public safety, we cannot say that such a conclusion is compelled by facts of which we can take notice.”⁹⁹ The bottom line is a heavy burden of proof on individual owners — “for all we know, the ordinance may have a *de minimis* effect on appellants”¹⁰⁰ — whose productive business has just been wiped out. The question of ends and means is articulated on the one hand and demolished in application on the other, and the destructive effect of this cavalier opinion on the nature of local politics is a large theme, one that cannot be canvassed here. But if *Euclid*¹⁰¹ set the basic presumption, the Court surely accepted and perhaps expanded it in this case to manifestly unacceptable length. It is as though there was no abuse in local politics that might be sensibly subject to a constitutional counterweight. Whatever one might think of the right of exit as a Tiebout limitation¹⁰² on local government, that sand and gravel could not migrate to the next township to escape the effects of local politics. The expandability of the police power was an important theme, and *Goldblatt* gave the law a solid push in the wrong direction.

The second of the police power cases is much more congenial. In *National Board of Young Men's Christian Associations v. United States*,¹⁰³ the question was whether the government was responsible for riot damage inflicted on two YMCA buildings in the Panama Canal Zone, close to the Panamanian border. The government moved

98. *Id.* at 595.

99. *Id.*

100. *Id.* at 596.

101. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

102. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). His theory in effect argued that local governments each provide a mix of goods and services (and the taxes to pay for them) so that the effective constraint against local government abuse is the right to leave the jurisdiction. That might work for families choosing whether to live in an area with good or bad schools, but it hardly protects owners of real estate against local exploitation.

103. 395 U.S. 85 (1969).

troops into the area because of rioting and looting, and when the troops took shelter from snipers inside the "Y," the buildings were burned down. The action against the rioters was obviously fruitless, so the "Y" turned to the United States government on the ground that the presence of federal army units inside the building spurred the rioters to take greater destructive steps.

This is one case that the government should have won. *Ex ante*, it is far from clear that the "Y" would prefer to go without protection, and far from clear that if it did, its facilities would have escaped destruction. So, the theory of causation is directed to the wrong target, and it is always a bad argument in tort to say that A should be liable solely because B is not. At one level therefore, the buildings were destroyed by the enemy, not the government. Moreover, even if the government were responsible, its actions were done in good faith for the benefit of the parties harmed, hardly a reason to impose strict liability on the very party who seeks to help the victims. Indeed the chief contribution of *YMCA* to the takings debate is that it shows how enormous a gulf lies between the justifications that the government asserts when it is in the right, and the mischievous arguments that it makes when, as in *Goldblatt*, and in *Euclid* before it, it is clearly in the wrong. It is not that the Courts cannot think of sensible lines of government privilege. It is that they do not think, at least until very recently, that sensible limitations were any part of its supervisory powers over state and local governments, which always received a clean bill of health.

IV. PUBLIC USE

The third of our key questions is whether the taking can take place at all. Obviously this issue will not arise if the government restrictions are justified under the police power, for then the public is protected from the aggression of one of its members. But there are many cases where the government offers compensation where this issue is of manifest concern. From the time of *Calder v. Bull*¹⁰⁴ to the present, courts have intoned that it is no part of the proper function of government to take property from A in order to give it to B, even if B is prepared to pay just compensation for it. Bypassing the market in these circumstances is a manifest infringement of individual liberty

104. 3 U.S. (3 Dall.) 386 (1798).

and an invitation to government abuse, one that undercuts the stability of private ownership that lies at the core of sound constitutional order and a market economy.

The difficulty with this version of the public use test is that few cases of general importance seem to fall within it. In some cases there are lots of people in the position of B, so it looks as though there is some wide scale public purpose or benefit that justifies the imposition. It becomes somewhat churlish to suggest that if one individual cannot force A off his land, then a conspiracy of many should not have that power. Either can buy in the open market. But with the rise of public housing projects for the poor in the 1930s, this barrier was overrun, for now land could be taken from private owners and rented out to particular tenants, in a taking from A_1 to A_n , with a transfer to B_1 to B_n .¹⁰⁵ Justice Douglas took the basic argument a step further when, in *Berman v. Parker*,¹⁰⁶ he concluded that the state could take over a local department store in a blighted neighborhood, even to sell it off again, as is, to another owner, as part of its neighborhood rehabilitation plan. Underlying his decision was an unqualified deference to Congress and its judgment about the proper determinants for good health and for good community living.¹⁰⁷ Those of us who think that planning is a disease that is best extirpated believe that this presumption is groundless and the exercise of the power is mischievous. But the later cases, most notably *Poletown*¹⁰⁸ at the state level and *Midkiff*¹⁰⁹ at the federal level, have upheld schemes that have allowed the simple transfer of ownership, in one case for the benefit of General Motors and the destruction of an entire neighborhood, and in the other when all that changed was who owned the property.

As indicated, these results are indefensible and invite the disruption of a social fabric which falls under the heading (both before and during the Warren years) as noncompensable good will.¹¹⁰ One reason to insist on a strong reading of the public use limitation is that the just compensation laws are so rigged as to provide landowners little

105. See, e.g., *In Re New York City Hous. Auth. v. Muller*, 1 N.E.2d 153 (N.Y. 1936).

106. 348 U.S. 26 (1954).

107. *Id.* at 32.

108. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981).

109. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

110. For my position, see Richard A. Epstein, *Rights and "Rights Talk,"* 105 HARV. L. REV. 1106, 1114-17 (1992), reviewing MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

protection against the government bulldozer.¹¹¹ Assessor and legal fees, good will, nontransferable goods, are not taken by the government even if they are costs incurred or benefits destroyed by government action. Loss of amenities and neighborhood are treated in the same mechanical fashion. The limitation on public use might be acceptable if the just compensation backstop were firmly in place, but in the absence of robust rules on compensation, there is an open invitation to land grab policies for the rich and influential that the public use language was designed to deter. Once again, the encomium to planning that fell from Justice Douglas' pen reads odd today. One wonders what happened to the blighted area that was targeted for renewal and improvement. It seems all too likely that communities have been savaged by the government that is called upon to protect them. Here is one instance where a stronger protection of property rights goes hand-in-hand with a stronger protection of community.

Berman aside, there was little that needed to be done or could be done on the public use frontier. The only *other* case that addresses this question is a deservedly obscure case called *Dugan v. Rank*,¹¹² which held that if the government diverts water from a private holder for public purposes, the taking cannot be enjoined in District Court, but rather by an action under the Tucker Act, which today has to be brought in the Federal Circuit. This jurisdictional two-step is much more onerous than is usually supposed. Sometimes it is far from clear whether the injunction should be sought in District Court, because compensation has not been tendered, or whether damages should be sought in the Federal Circuit. In *Preseault v. Interstate Commerce Comm'n*,¹¹³ for example, the Supreme Court on its own motion dismissed the plaintiff's cause of action for want of jurisdiction on the ground that the Rails-to-Trails Act did not prevent individual holders of reversionary interests from seeking compensation under the Tucker Act against the United States.¹¹⁴ The Court's unfortunate decision meant that the landowner's petition to regain possession of his property was misguided, and that action had to shift to the federal circuit for compensation. The division of business between the District

111. See Gideon Kanner, *When Is 'Property' Not 'Property Itself': A Critical Examination of the Bases of Denial of Compensation for the Loss of Goodwill in Eminent Domain*, 6 CAL. W. L. REV. 57 (1969).

112. 372 U.S. 609 (1963).

113. 494 U.S. 1 (1990).

114. The National Trails System Act Amendments of 1983 (Amendments), Pub. L. No. 98-11, 97 Stat. 48 (1985) (codified in 16 U.S.C. § 1247(d) (1994)).

Court and the Federal Circuit contemplated by *Dugan* is tolerable (if unwise) so long as the government makes it clear that it is committed to the taking. But when the legal situation is murky, the present jurisdictional rules create an unnecessary divide between two different courts, which invites a huge constitutional shell game that should be condemned even by those who think well of vesting the government with major planning powers.

V. COMPENSATION

The last part of the analysis concerns the nature of the compensation that is offered for a taking. Sometimes it is cash and in other cases it is in kind. A full analysis of this question is one that requires a close look at the distribution of benefits and burdens of regulations. It is an analysis which looks with presumptive suspicion on selective restrictions on some property owners and presumptive approval on statutes that impose uniform restrictions on the same group that receives a set of uniform benefits. I think that sorting out these relationships is one of the major tasks of a sensible set of constitutional norms of the just compensation issue, but there is little if anything in the Warren Court oeuvre that addresses this question, so the analysis again is focused on decisions before and after it sat.

VI. CONCLUSION

It should be clear that I am the odd man out from this celebration of the Warren Court. Its work on property was generally perfunctory, occasionally mischievous and only rarely informative. But lest anyone think that this means I am a strong critic of the Warren Court, I hope that the effort would show that my own positions are decidedly more complex. I am generally supportive of the *Miranda* developments,¹¹⁵ and of reapportionment. I have no hidden qualms about *Brown v. Board of Education*.¹¹⁶ While I think that *New York Times v. Sullivan*¹¹⁷ ventured too far from the safe portals of common law defamation, on its facts the decision was clearly correct, no matter how much I disagree with the *Times*' editorials on property rights, health care or affirmative action. Indeed any effort to impose sensible judicial limitations on representative government will have a respectful hearing

115. *Miranda v. Arizona*, 384 U.S. 436 (1966).

116. 347 U.S. 483 (1954).

117. 376 U.S. 254 (1964). See Richard A. Epstein, *Was New York Times v. Sullivan Wrong?* 53 U. CHI. L. REV. 782 (1986).

from me, for mine is not a conservative critique of the position of the Court, but one that accepts its anti-majoritarian orientation and wishes that it extended to cover other areas as well. I do not see any opposition between liberty and property but regard them, as the Due Process Clause has them, as linked in a single yoke. My quarrel with the Warren Court is that it fell asleep at a constitutional switch, when it should have been more aware of the major contribution that the strong protection of property rights has for the overall constitutional order.